United States Department of Labor
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
Washington, D.C. 20001

NOTICE: This is an electronic bench opinion which has not been verified as official.

DATE: January 29, 1998

CASE NO.: **97 INA 067**

In the Matter of:

ALTERATIONS BY NINA,
Employer

on behalf of

MANUELA HAVRILIUC,
Alien

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an employer's application for alien labor certification filed for MANUELA HAVRILIUC ("Alien") by ALTERATIONS BY NINA ("Employer") under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On August 17, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Embroiderer." AF 34, et seq." The position was Classified under DOT No. 782. 684-018, Embroiderer, Hand."[3] The job duties were described as follows:

> Embroider jackets, dresses and uniforms.
> Design, alter, fits mens', women's and children clothing allowing for embroidery.
> Repair garments expecially embroidered clothing.

AF 34. (Punctuation as in original). The education requirement was eight years of grade school.[4] The Employer required two years of experience in the Job Offered. The wage rate was $10.28 per hour for a forty hour week from 8:30 AM to 4:30 PM.

Notice of Findings. On April 3, 1996, certification was

---

[2]Administrative notice is taken of the Dictionary of Occupational Titles (DOT), published by the Employment and Training Administration of the U. S. Department of Labor.

[3]**782.684-018 EMBROIDERER, HAND** (tex. prod., nec) alternate titles: decorator, hand embroiders ornamental designs by hand over stamped or stenciled designs on fabric material: Fastens embroidery hoop over fabric to keep fabric taut. Threads needle with kind and color of thread specified on work ticket. Sews along cut lines of stamped design, utilizing knowledge of various stitches that may be required. May place fabric in frame instead of embroidery hoop to keep fabric taut. May use strings of beads instead of colored thread for ornamental work. May pin design on fabric preparatory to embroidering. May be designated according to specialty performed or item worked on as Initial Maker (garment); Quilt Sewer, Hand (tex. prod., nec). GOE: 06.02.27 STRENGTH: S GED: R3 M1 L2 SVP: 5 DLU: 77

[4]The Alien had completed an undergraduate degree in science, and a Master of Science degree in Science/Mathematics from a Rumanian University. Her work experience, however, was as an embroiderer in Romania, where she worked for two employers from September 1982 to March 1987, and from January 1992 to the date of application. AF 94-95.

denied in the CO's Notice of Findings("NOF"), subject to rebuttal by the Employer. The CO itemized the reasons for rejecting this application for alien certification, and then specified the evidence that Employer was required to file and the remedial action the Employer was to take in order to rebut each of the findings that follow.

1. The CO said that the Employer's statement of job duties required a combination of the work of a custom tailor, an alterations tailor, and an embroiderer, hand, observing that its application stated a position description that violated 20 CFR § 656.21(b)(2)(ii). The CO explained that, "If an employer's job description lists duties that do not appear in any single Dictionary of Occupational Titles job description, then the petitioned position requires a combination of duties." Moreover, said the CO, the Employer did not demonstrate that it has normally employed persons to perform this combination of duties, and/or that workers customarily perform the combination of duties in the area of intended employment, or that this combination of duties results from business necessity. AF 29-30. 2. The CO then said that the Employer's job advertisements lacked specificity, noting that the text of the advertisement did not include a reference to her requirement of hand embroidery, citing 20 CFR § 656.21(g). AF 31. 3. Finally, the CO found that the Employer's application did not demonstrate that she had the financial capacity to pay the offered hourly wage, whether or not a current job opening exists to which U. S. workers can be referred, and whether there is a current existing business operated by the Employer, citing 20 CFR §§ 656.20(c)(1), 656.20(c)(4), and 656.20(c)(8). Id.

Rebuttal. On April 29, 1996, the Employer filed a Rebuttal addressing the NOF. AF 09-27. The Rebuttal agreed to amend the job description by deleting all reference to alterations and tailoring and referring exclusively to the hiring of an embroiderer. In addition, Employer filed a financial statement which she said would establish her fiscal capacity to pay a worker's wages for performing the duties required in this job.

Final Determination. The CO denied certification by a Final Determination, dated May 31, 1996. AF 07-08. In summarizing the case the CO apparently accepted the proffered amendment and readvertisement as sufficient to rebut the findings as to the combination of duties. Addressing the Employer's Rebuttal, the CO concluded (1) that she had failed to show that sufficient funds are available to pay the wage offered and (2) that for this reason a job that is clearly open to U. S. workers does not exist. Consequently, certification was denied. AF 08.

Appeal. The Employer requested review by BALCA on June 21, 1996. She contended that her "net profit was more than the

annual total wage," arguing that although this demonstrated that the funds to pay the wage offered were more than sufficient, the CO's finding ignored this inference. The Employer contended also that the CO's conclusion had relied instead on "a memo from the local job service that the employer was a one person business who could not afford to pay the wages." The Employer contended that, "The CO should have at least done a supplementary NOF asking for clarification."[5]

Discussion

Notwithstanding the arguments of the Employer, the panel must consider that under 20 CFR § 656.2(b) the Employer has the burden of proving the essential facts necessary to prove her entitlement to the approval of alien labor certification under the Act. § 291 of the Act (8 U.S.C. § 1361) provides that whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document or is not subject to any exclusion under any provision of this Act. In this case, for example, the CO made a factual finding that the Employer had not established that a job opportunity offering permanent full time employment existed. The panel must determine whether that is a reasonable inference from the evidence of record.

After examining the Appellate File we find sufficient evidence of record for the CO to have reached this conclusion. It follows that the CO's finding should be affirmed under all of the facts of this case, as the Employer failed to sustain her burden of proving that she is entitled to certification of this position for the reasons that follow.

The position as "embroiderer" that the Employer offered at $10.28 per hour promises wages that total $411.20 per forty hour week or $21,382.40 per fifty-two week year. AF 34. The State Department of Taxation certified to Business License Department that the Employer had no employees on January 4, 1993, and that she was the sole owner of the business that seeks certification of a position for the Alien. As this document was signed by the Employer and submitted with her application, it is accepted as an admission against interest where applied to the evidence of record in this case. AF 79. She also certified to that agency on the same date that she performs alterations only, asserting that "No garments will be made." AF 80. Because this representation

[5]While panel notes that the Employer also presented arguments justifying the combination of duties and noting her willingness to rerun the advertisement as corrected in compliance with the NOF, her contentions as to these issues are given no weight, as the CO did not allude to them in the Final Determination.

also was consistent with the net assessed value of the personal property at her place of business during the 1993-1994 fiscal year, $620, this document confirmed the CO's inference as to the size and nature of the Employer's enterprise. The tax return filed with this application indicated that during calendar year 1995, the Employer's gross receipts were $36.838 and her gross income was $66,783. After deduction of business expenses of $36,502, her net profit was $30,281, which is assumed to be the amount that the Employer withdrew from the business for her own maintenance. AF 44.

Noting that the Employer's appeal complains that the CO ignored her evidence proving that she had sufficient funds to pay the worker to be hired, the panel is not persuaded that, while her net profit of $30,281, could pay the $21,382.40 per year that the application represented that she could pay to the new employee she intended to hire, less than half of that profit or $8,898.60, would have been available for Employer to withdraw from the business for her own maintenance with the same volume of business during that calendar year, if the position had been filled. AF 14.

As it is well-established that certification may be denied if employer's own evidence does not show that the position is permanent and full time, it is relevant that the above-discussed evidence is sufficient to support the CO's inference that the Employer failed to demonstrate that she is offering permanent, full time work within the meaning of 20 CFR § 656.3. **Gerata Systems America, Inc.**, 88 INA 344(Dec. 16, 1988). Accordingly, we conclude that the CO correctly denied certification, and the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

_____

FREDERICK D. NEUSNER
Administrative Law Judge

Dissent:

Judge Lawson dissents from the conclusion and opinion of the majority.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.